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Report on the activities of the Office of Internal Oversight Services

Report of the Office of Internal Oversight Services on the activities of the Procurement Task Force for the period from 1 July 2007 to 31 July 2008

Note by the Secretary-General

The Secretary-General has the honour to transmit for the consideration of the General Assembly his comments on the report of the Office of Internal Oversight Services on the activities of the Procurement Task Force for the period from 1 July 2007 to 31 July 2008 (A/63/329).

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Summary

The report of the Office of Internal Oversight Services (OIOS) on the activities of the Procurement Task Force for the 13-month period ended 31 July 2008 summarizes the activities of the Task Force during that period. The present note provides comments and clarifications on the information contained in the report for the consideration of the General Assembly.

The Secretary-General stresses that, as many of the cases summarized in the OIOS report remain under consideration, the findings of the Procurement Task Force should be regarded as those of the Task Force, and not a final determination by the Organization.

I. Introduction

1. The present note gives additional information to provide a fuller picture for the General Assembly during its consideration of the report of the Office of Internal Oversight Services (OIOS) on the activities of the Procurement Task Force for the period from 1 July 2007 to 31 July 2008.

II. General comments on the report

2. At the outset, the Secretary-General would like to emphasize that the amounts referred to in the summary and in paragraph 3 of the report do not reflect financial losses to the Organization. Rather, the amounts represent the total contract value which has, in the view of OIOS, been tainted by corruption or fraud.

3. In its report, OIOS has included information on the findings of its investigations during the reporting period. While OIOS may have completed its investigations and finalized the related report, the final determination of whether any rules have in fact been breached is made by the Secretary-General and his programme managers, followed by internal justice proceedings where applicable. Most of the Task Force's reports summarized in the OIOS report remain under review by the Administration. That being the case, the Secretary-General reiterates that the findings of the Task Force should be regarded as those of the Task Force, and not a final determination by the Organization. Each of the staff members concerned is presumed innocent pending the conclusion of his or her case.

4. Below are specific comments set out by reference to the relevant sections of the OIOS report.

III. Comments on due process (section III)

5. The Secretary-General refers to the detailed information contained in paragraph 13 of his report on implementation of the recommendations contained in the report of the Board of Auditors on the activities of the Task Force (A/63/167/Add.1), with regard to recommendation of the Board of Auditors that the Administration standardize and consolidate the rules and procedures applicable to all investigations in the United Nations under an instruction of the Secretary-General, and that such instruction be systematically given to staff interviewed. The Secretary-General considers that implementation of this recommendation will provide additional clarity of due process rights in the context of investigations whether undertaken by the Task Force or the Investigations Division of OIOS, programme managers or any of the other entities entrusted to carry out administrative fact-finding investigations.

IV. Comments on defining misconduct (section IV)

6. At the outset, the Secretary-General emphasizes that decisions relating to whether a particular action constitutes misconduct rest with him and are taken after consideration of the totality of the facts and in consultation with all concerned units of the Organization. While OIOS may make findings and recommendations

regarding actions to be initiated pursuant to its investigations, the decision on what action should be taken rests with the Secretary-General and the provision of legal advice to the Secretary-General and to other organs under the Charter of the United Nations on the propriety of any action falls within the competence of the Legal Counsel. Further, conduct which appears to be in violation of applicable United Nations regulations or rules, but does not give rise to potential breaches of national law and may be subject to criminal prosecution (for example disciplinary issues such as misconduct), falls primarily within the purview of the Office of Human Resources Management.

7. The first sentence of paragraph 16 of the OIOS report states: "OIOS maintains that certain types of severe performance failures constitute misconduct, and it is well within the discretion of the Secretary-General to make such a determination". The Secretary-General concurs that severe performance failures may rise to the level of misconduct and reiterates that the institution of disciplinary action in such cases falls within his discretion. As is inherent in the exercise of any discretion, each case must be considered on its facts and, as such, an OIOS recommendation or finding of severe performance failings does not necessarily constitute misconduct or bind the discretion of the Secretary-General.

V. Comments on the Task Force's investigative and reporting procedures (section V)

8. The Secretary-General has no comments.

VI. Comments on vendor investigations and recommendations (section VI)

9. The Secretary-General takes note of the issues raised by the Task Force regarding vendors, their agents and intermediaries who refuse to cooperate with investigations in some instances. The Organization has introduced robust measures to facilitate cooperation by vendors with the investigations of the Task Force and with any other oversight body of the United Nations. These measures include:

(a) The introduction of new registration criteria to be applied to potential United Nations vendors, including a declaration that the potential vendor's subsidiaries, agents, intermediaries and principals agree to cooperate with OIOS during any investigative services undertaken by it, either before, during or after the execution of a contract. Such cooperation includes the provision of all requested documents, records and financial information, as well as access to employees, officers and staff;

(b) The adoption of the new United Nations General Conditions for Contract as revised in January 2008, which confer upon the United Nations the right to conduct an investigation of the vendor's operations in regard to any aspect of the award, and to impose a corresponding duty upon the vendor to cooperate with such an investigation, pursuant to paragraph 24.2 of the revised General Conditions of Contract. The vendor is obligated to provide full and timely cooperation with any such inspections, post-payment audits or investigations. It is significant to note that the duty to cooperate with an investigation of the United Nations does not lapse

upon expiration or prior termination of the contract. Moreover, the vendor is required to obligate its agents, including but not limited to the vendor's attorneys, accountants or other advisers, to reasonably cooperate with any pertinent inspections, post-payment audits or investigations carried out by the United Nations;

(c) The application of the United Nations Supplier Code of Conduct. This Code of Conduct contains provisions which confer upon the United Nations the right to conduct investigations. The Code expressly states that the United Nations General Conditions of Contract are an essential part of United Nations contracts and are therefore legally enforceable against United Nations vendors. The obligation to cooperate with inspections, post-payment audits or investigations carried out by the United Nations with reference to any aspect of a United Nations contract pursuant to the General Conditions of Contract, is therefore strengthened by the provisions of the Supplier Code of Conduct.

10. Specifically, with respect to the OIOS recommendation concerning the cooperation of vendors with investigations, the Secretary-General notes that the last sentence of paragraph 28 of the OIOS report states that it is unclear whether the cooperation provision included in the General Conditions of Contract applies also to subcontractors. The Secretary-General wishes to clarify that subcontractors are not a party to a contract entered into between the United Nations and a vendor. Thus, unless the terms of the relevant contracts specify that the subcontractor agrees to be bound by all of the terms and conditions of the contract between the vendor and the United Nations, including the cooperation provision of the General Conditions of Contract, such contract terms would not necessarily be applicable to subcontractors. Nevertheless, the Secretary-General notes that, pursuant to the relevant provisions of the General Conditions of Contract, the United Nations has the right to approve assignments by the vendor and to approve any subcontractors. The Secretary-General also notes that pursuant to the General Conditions of Contract, the terms of any subcontract entered into between a vendor and a subcontractor must be subject to, and must be construed in a manner that is fully in accordance with, all of the terms and conditions of the main contract.

11. The Secretary-General wishes to clarify that the Procurement Manual offers detailed guidelines governing the removal and suspension of vendors. The Vendor Review Committee deliberates individual cases and recommends the removal or suspension of vendors deemed to have violated contractual provisions. In addition to removing and suspending defaulting vendors from the United Nations vendor roster, the Procurement Division continues to provide notice of vendor removal and suspension to peacekeeping missions, offices away from Headquarters, tribunals, commissions, political missions, agencies, funds and programmes throughout the United Nations system, as well as the Global Compact Office. Moreover, information regarding suspended or removed vendors is available on the Procurement Division's public website. The General Assembly may wish to note that one of the objectives of the Procurement Network of the High-level Committee on Management is the establishment of a global information-sharing network among members in relation to vendors' conduct.

12. Finally, as a general comment, the Secretary-General notes that the OIOS recommendations aim at significantly expanding the range and scope of the Organization's current sanctions regime against vendors who engage in malfeasance. Such recommendations include, for example, (a) the expansion of the

range of sanctions beyond the existing ones of temporary suspension and permanent removal of vendors from the vendors' roster to include, inter alia, sanctions of a financial nature (paragraphs 32 to 34 of the OIOS report); (b) the publication and dissemination of information concerning the Organization's imposition of sanctions on vendors (paragraphs 37 and 38 of the OIOS report); and (c) the imposition of sanctions on company officials and not only on companies, as well as on vendors who are not on the United Nations vendors roster and thus not in any contractual relationship with the Organization (paragraphs 39 and 40 of the OIOS report).

13. The Secretary-General supports the proposals of OIOS for strengthening the Organization's vendor sanctions regime in order to allow the United Nations to have greater flexibility in dealing with vendors who engage in fraud or other malfeasance. The Secretary-General notes that the recommendations set forth in the OIOS report are, for the most part, based on processes and procedures established by certain international financial institutions, including the World Bank and the Asian Development Bank, and that these institutions have set up comprehensive and elaborate quasi-judicial procedures in order to ensure due process for the vendors involved.

14. The Secretary-General agrees that the procedures that have been established by these financial institutions could serve as possible models for the Organization's own undertaking to enhance its sanctions regime. In that regard, it is important to ensure that any new enhanced regime is implemented in a manner that fully protects the interests and legal rights of the Organization, provides the flexibility that OIOS seeks and addresses satisfactorily any complaints by aggrieved vendors subjected to sanctions.

15. To that end, the Secretary-General believes that it is advisable, and indeed necessary, for the Organization to undertake an in-depth review of the procedures that these institutions have in place, and also obtain "lessons learned" information from them. In addition, such review would consider and make recommendations on the legislative framework for establishing the proposed expanded regime.

VII. Comments on implementation of the Task Force's recommendations, referrals for prosecution and recovery actions (section VII)

16. In paragraph 42, the Task Force indicates that 34 of its 68 recommendations issued during the reporting period remain unaddressed. The Secretary-General would like to assure the General Assembly that all reports and recommendations of the Task Force, including the 34 recommendations referenced above, are being actively considered and, where accepted by the Secretary-General, appropriate action is being taken. It should be noted that in the first quarter of 2008, the Management Committee conducted a review of the implementation of all recommendations of the Task Force and will conduct another review by the end of the year. While action on such reports is taken as expeditiously as possible, such matters require careful review and consideration involving all concerned units of the Organization. This careful review and consideration cannot be avoided and must be taken into account.

17. In this regard, OIOS makes particular reference to the implementation of its recommendations for referral to national authorities, as well as legal action with regard to the recovery of funds. During the period covered by the OIOS report, the Organization has taken various actions with respect to referrals of cases and the pursuit of restitution and damages where deemed appropriate and has, in one case, been awarded $932,165.99 in restitution. Actions instituted during the reporting period in another case have given rise to an award totalling $515,285.41.

18. OIOS recommendations for referral to criminal authorities and recommendations to institute legal action, including civil action in national court systems, do not and cannot automatically result in such action. Any such recommendation must first go through a careful evaluation process which encompasses an analysis of policy considerations as well as those of a legal nature, involving all concerned units of the Organization, before any such referral is made. The final decision in all cases of referral rests with the Secretary-General and, once a decision is made to refer, the Office of Legal Affairs promptly implements such referral.

19. Examples of factors which must be taken into consideration prior to instituting legal action include the impact on privileges and immunities; the likelihood of the success of the claim if pursued; the impact upon the reputation of the Organization caused by becoming party to a lawsuit; an evaluation of the expected cost and benefit of entering into such action in view of the high costs and uncertainties of litigation; the exposure of the Organization to financial and other risks; and the potential impact on the internal justice system of the Organization.

20. With regard to OIOS recommendations to institute civil action, in some cases the evidence presented by OIOS in support of its recommendations has not been considered sufficient to bring a successful civil action. In other cases, civil action may not be an option due to contractual limitations or for policy reasons. In cases where OIOS recommendations for civil action are presented in tandem with recommendations for criminal referrals, awaiting the result of the criminal trial and subsequent sentencing before civil proceedings are instituted can be the most effective way to proceed. This is because an award of financial restitution and recovery for the Organization can be the result of criminal proceedings, thereby rendering further action unnecessary and avoiding the high costs of litigation.

21. The Secretary-General further notes that OIOS recommendations for financial recovery actions require full consideration as to the legal feasibility or likelihood of success of such actions. The discussion in paragraph 45 of the OIOS report regarding civil law does not take into account the diversity of, and differences in, the civil and criminal legislative frameworks of the many jurisdictions in which the Organization operates. This diversity leads to a high degree of uncertainty regarding the potential success of civil recovery actions without further detailed and jurisdictionally specific research which requires sufficient time and resources to execute. This must be balanced against the overall benefit of entering into such action given the high costs and uncertainty of litigation.

22. With regard to OIOS recommendations for financial recovery to be taken against staff members, the Secretary-General would reiterate that such recommendations do not automatically result in the recommended action being taken. All recommendations are carefully considered by the Administration, and the final decision to pursue, or not to pursue, an action for financial recovery is the

result of various legal and policy considerations involving all concerned units of the Organization, including consultation with, and input from, OIOS.

23. For those recommendations made by OIOS for financial recovery under the Organization's internal justice procedures, the Administration is bound to evaluate and conduct each case in accordance with the policy of the Organization, as set out in the administrative instruction on financial responsibility of staff members for gross negligence (ST/AI/2004/3), and the procedures contained therein. The Secretary-General notes that this policy is limited to the recovery of any financial loss suffered by the United Nations as a result of a staff member's gross negligence or violation of the Organization's regulations, rules or administrative instructions. The Administration has indicated to OIOS that in order for allegations of gross negligence or misconduct resulting in financial loss to be pursued, the policy requires that a computation of the loss which the Organization proposes to recover be prepared, together with an explanation of the basis on which the computation was made.

24. In cases where OIOS does not provide a computation in its reports that may be used to initiate the recovery action recommended under ST/AI/2004/3, the Administration requests this computation from OIOS. Pending receipt of the computation, the staff member concerned is charged with misconduct, and the Administration reserves the right to initiate recovery action. Upon receipt of a computation from OIOS and an explanation of the basis upon which it was made, the Administration considers initiating recovery action against the staff member concerned in accordance with the established policy and procedure.

VIII. Comments on major investigations: results and recommendations (section VIII)

25. As most of the cases summarized in the OIOS report remain under active review, the Secretary-General reiterates that the findings of the Task Force reflected in the OIOS report are those of the Task Force and do not represent a final determination by the Organization.